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CASE NO.: _____

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1993 TERM

CARL J. DUNCAN,

Petitioner,

v.

GEOFFREY G. STRANGE,

Respondent.

_____/

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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52 pp

QUESTIONS FOR REVIEW

I. In view of prior rulings by the Supreme Court of the United States, does Federal Rule of Appellate Procedure 4(a)(4) apply to motions not properly before the district court at the time appeal is taken?

II. In the order on appeal, the Eleventh Circuit Court of Appeals says that motions improperly before the district court do toll the time for appeal but in Simmons v. Ghent, 970 F.2d 392 (7th Cir. 1992) the court held that they do not. Which is correct?

III. Do Budinich v. Becton Dickinson and Co., 486 U.S. 196, 108 S.Ct. 1717, 100 L. Ed.2d 178 (1988) and Acosta v. Louisiana Department of Health and Human Resources, 478 U.S. 251, 106 S.Ct. 2876, 92 L.Ed.2d 192, (1986)(per curiam) allow a Rule 59, Fed.R. Civ.P., motion to create a Rule 4(a)(4), Fed.R.App.P., bar to appeal when the motion does not address what is appealed?

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1. C. Duncan is the only appellant in the lower court. RITA KAY DUNCAN, EDWARD M. JACKSON and LAWRENCE M. LITUS are appellees in the lower court not cited herein as noted in the required Supreme Court Rule 12.4 statement filed herewith. There are no corporations or subsidiaries.

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Duncan v. Duncan, et al., Case No. 92-40291-MMP, United States District Court for the Northern District of Florida. ORDER dated April 24, 1993. (unpublished)

JURISDICTIONAL STATEMENT

The United States Circuit Court of Appeals for the Eleventh Circuit entered its final order effectively separating and dismissing from the case the appeal of the award of fees and costs to Appellee Geoffrey G. Strange on September 23, 1993 and on November 29, 1993 denied the Petitioner's petition for rehearing, entering same on that date. This Court has jurisdiction pursuant to the Act of June 27, 1988, Public Law 100-352, 102 Statute 662, United States Code, Title 28, Section 1254(1).

LEGAL AUTHORITIES INVOLVED

Title 28, United States Code, Section 1254(1)

Federal Rule of Civil Procedure 59(e)

Federal Rule of Appellate Procedure 3(c)

Federal Rule of Appellate Procedure 4(a)(1)

Federal Rule of Appellate Procedure 4(a)(4)

United States Supreme Court Rule 10.1(a)

United States Supreme Court Rule 10.1(c)

United States District Court for the Northern District of Florida Local Rule 6(A)

United States District Court for the Northern District of Florida Local Rule 6(C)

STATEMENT OF THE CASE

At the hearing of October 14, 1992, the district court granted the defendants' motions to dismiss and authorized them to seek fees. Respondent Geoffrey G. Strange filed a motion for $3895.50 in fees and $161.06 in costs covering the period of August 5, 1992 through October 27, 1992. Two other defendants sought fees and the

Petitioner moved for rehearing. The district court set all these motions to hearing for March 25, 1993.

At the March 25, 1993 hearing, Strange filed in open court a second motion for fees in the amount of $2500.00 and costs in the amount of $141.00. The district court granted Strange's first motion but denied his second motion, the final order (APPENDIX 2) issuing on March 26, 1993 and the judgment being entered on March 29, 1993. (APPENDIX 3). On March 30, 1993 the district court sua sponte entered a corrected judgment. (APPENDIX 4).

On April 5, 1993, Strange moved for clarification of the denial of his second motion for fees and costs. (APPENDIX 7) which Duncan opposed on grounds it sought review of a matter thrice denied, it is improperly filed contrary to Northern Florida District Court Local Rule 6(A) in that the required memorandum is not pre-

sent, and that pursuant to the same local rule the motion is a nullity because the rule declares that the clerk is not authorized to file it in that form. On April 26, 1993 the district court accepted Duncan's argument and issued an order denying Strange's motion for clarification. (APPENDIX 5). That order was entered on April 28, 1993.

Since the district court had accepted Duncan's argument that Strange's motion was a nullity, Duncan filed a notice of appeal on April 27, 1993, stating therein that he was not appealing the part of the final order and judgment which Strange's motion for clarification had addressed. (APPENDIX 8). This is in accord with Rule 3(c), Fed.R.App.P., that if only part of an order or judgment is stated, the part that is appealed must be cited in the notice.

On May 25, 1993 the Eleventh Circuit Court of Appeals issued two jurisdictional questions as to why the above cited events

had not created a bar to appeal pursuant to Rule 4(a)(4), Fed.R.App.P., (APPENDIX 9) and invited the parties to file a reply within fourteen (14) days. Duncan and Strange responded as did appellee Edward M. Jackson. On September 23, 1993 the Eleventh Circuit issued and entered its decision saying that everything in the notice of appeal could be reviewed except the award of fees and costs to Strange. (APPENDIX 1). Duncan moved for rehearing on grounds that Strange's motion was a nullity and formed no bar, the lower district court had already upheld that fact, the Seventh Circuit had held in Simmons v. Ghent, 970 F.2d 392 (7th Cir. 1992) that improperly filed motions are a nullity and form no bar under Rule 4(a)(4), that the United States Supreme Court had ruled similarly to the petitioner's arguments in past precedences, and that Strange's motion for clarification in the trial court addressed something not appealed.

On November 29, 1993 the Eleventh Circuit denied rehearing on grounds that Duncan's argument as to the nullity of Strange's motion in the district court is meritless. (APPENDIX 6). The Petitioner now seeks review to clarify the conflict between the Seventh and Eleventh Circuits, conflicts between the Eleventh Circuit and the Supreme Court on controlling points of law, and to aid the Court in establishing a uniform interpretation of Rule 4(a)(4), Fed.R.App.P., as to whether or not improperly filed motions can create a Rule 4(a)(4) bar and as to whether or not a motion filed under Rule 59(e), Fed.R.Civ. P., has an effect on a notice of appeal if the Rule 59(e) motion addresses a matter specifically stated in the notice of appeal to not be appealed.

SUMMARY OF ARGUMENT

The Petitioner will present that based on precedences of the United States Supreme Court and a decision of the

Seventh Circuit Court of Appeals, which conflicts with the Eleventh Circuit's ruling, that null filings in a district court do not invoke a Rule 4(a)(4), Fed.R. App.P., bar to a notice of appeal and that a Rule 59(e), Fed.R.Civ.P., motion filed in the district court does not invoke Rule 4(a)(4), Fed.R.App.P., when the subject of the motion addresses an issue that the notice of appeal says is NOT requested for review.

The Petitioner contends that he can find no precedence on these matters and that he can find a conflict between courts on the matter. Therefore, this Court has jurisdiction pursuant to Supreme Court Rule 10.1(a) and (c).

ARGUMENT

I. IN VIEW OF PRIOR RULINGS BY THE SUPREME COURT OF THE UNITED STATES, DOES FEDERAL RULE OF APPELLATE PROCEDURE 4(a)(4) APPLY TO MOTIONS NOT PROPERLY BEFORE THE DISTRICT COURT AT TIME APPEAL IS TAKEN?

United States District Court for the

Northern District of Florida Local Rule 6(A) says that all motions must be accompanied by "a memorandum citation of authorities in support of the motion" and that the "clerk shall not accept any motions not accompanied by such memorandum" except as cited in the rule. Respondent Geoffrey G. Strange's Motion for Clarification (APPENDIX 7) filed in the district court is not one of those motions cited as being exempted from the rule. As such, it is a nullity.

In Elliott v. Piersol, 1 Pet. 326, 7 L.Ed. 164 (1828) this Court held that if a clerk of court takes an action which is not authorized by law, both the act and result thereof are a nullity and may not be relied on or enforced. In Elliott, 1 Pet. at 340 the court said that "if it act without authority, its judgments and orders are regarded as nullities."

Based on Elliott and the district court's own local rule 6(A), it had no

choice but to deny Strange's motion because the clerk inadvertently erred by filing it contrary to law. The filing gave it no validity pursuant to Elliott. Thus, the motion for clarification, pursuant to Elliott, cannot be relied on as invoking a bar by tolling the time for appeal under Rule 4(a)(4), Fed.R.App.P., because that rule presupposes that anything filed under the rule is properly filed. In Elliott, Id. the court said that null events "form no bar" and cannot be relied upon.

Although the district court's order (APPENDIX 5) does not state a reason why it denied Strange's motion, it is fair to assume that since Duncan raised the issue in rebuttal, the district court agreed with it. This is true because a party has a right to rely on the district court's local rules to defeat a motion against him. Weil v. Neary, 278 U.S. 160, 49 S. Ct. 144, 73 L.Ed. 243 (1929); Woods Con-

struction Company v. Atlas Chemical Industries, Inc., 337 F.2d 888 (10th Cir. 1964).

The specific intent of Acosta v. Louisiana Department of Health and Human Resources, 478 U.S. 251, 106 S.Ct. 2876, 92 L.Ed.2d 192 (1986)(per curiam) was to make it clear that there are no exceptions to Rule 4(a)(4), Fed.R.App.P. However, there is also another intent made clear in Acosta, and that is that the rules of court are binding. Thus Acosta, while not specifically stating it, affirms the ruling in Weil v. Neary that the rules of court, to include local rules, are binding.

This enforces the issue raised by Duncan, when he was required by Northern District Court of Florida Local Rule 6(C) to respond to Strange's motion or risk it being granted by default, that the district court agreed that Strange's motion is a nullity.

In Wallace v. Loomis, 97 U.S. 146, 156-57 et sqq., 24 L.Ed. 895 (1878) this

Court declared that if a court enters an order and has authority to enter that order, the order is binding. Since the district court's order denying Strange's Motion for Clarification as a nullity for being improperly filed was not set off by the Eleventh Circuit Court of Appeals, the ruling by the district court is even binding on the appellate court and it could not accept the ruling otherwise. (APPENDIX 6).

While the Eleventh Circuit stated that Duncan's argument was without merit, it is the Eleventh Circuit which has failed to cite any authority or reason for its conclusion which is contrary to law. As noted, the Eleventh Circuit in its order did not in any way alter the lower court's order but just disagreed with it even though the order is not on appeal. In so doing it came into conflict with precedences of this Court.

The Court should grant certiorari in

aid of its own jurisdiction and/or authority to resolve the conflict herein shown to exist.

II. IN THE ORDER ON APPEAL, THE ELEVENTH CIRCUIT COURT OF APPEALS SAYS THAT MOTIONS IMPROPERLY BEFORE THE DISTRICT COURT DO TOLL THE TIME FOR APPEAL, BUT IN SIMMONS V. GHENT, 970 F.2d 392 (7th Cir. 1992) THE COURT HELD THAT THEY DO NOT. WHICH IS CORRECT?

In Simmons v. Ghent, 970 F.2d 392 (7th Cir. 1992) a motion for rehearing was filed pursuant to Rule 59, Fed.R.Civ.P., and was denied after which appeal was taken before the order was entered on the docket. Ghent sought to dismiss under Rule 4(a)(4), Fed.R.App.P. The Seventh Circuit held that it did have jurisdiction because the motion for rehearing was filed late and therefore was null since it wasn't timely filed and did not figure. As such, it held no bar under Rule 4(a)(4) existed.

In Simmons the issue was that the Rule 59, Fed.R.Civ.P. motion was untimely filed so was never before the lower court. It was determined that this failed to cre-

ate a bar pursuant to Rule 4(a)(4). In the instant petition the issue is that the Rule 59(e), Fed.R.Civ.P., motion was not properly filed and that the local district court rule forbid it to be filed in the form it was filed because that made it a nullity and created no Rule 4(a)(4) bar. The Eleventh Circuit said that a null filing does create a Rule 4(a)(4) bar.

This Court should grant certiorari to determine the conflict between the Seventh Circuit and Eleventh Circuit Courts of Appeal as to whether or not Rule 59, Fed. R.Civ.P., motions improperly filed in the district court toll the time for appeal as set forth in Rule 4(a)(4), Fed.R.App.P.

III. DO BUDINICH V. BECTON DICKINSON AND CO., 486 U.S. 196, 108 S.Ct. 1717, 100 L. ED.2d 178 (1988) AND ACOSTA V. LOUISIANA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, 478 U.S. 251, 106 S.Ct. 2876, 92 L.ED.2d 192 (1986)(PER CURIAM) ALLOW A RULE 59, FED.R.CIV.P., MOTION TO CREATE A RULE 4(a)(4), FED.R.APP.P., BAR TO APPEAL WHEN THE MOTION DOES NOT ADDRESS WHAT IS APPEALED?

Although it did not address this in

Budinich v. Becton Dickinson and Co., 486 U.S. 196, 108 S.Ct. 1717, 100 L.Ed.2d 178 (1988), Budinich clarified Acosta v. Louisiana Department of Health and Human Resources, 478 U.S. 251, 106 S.Ct. 2876, 92 L.Ed.2d 192 (1986)(per curiam) and the application of Rule 4(a)(4), Fed.R.App.P. In Budinich, Budinich had filed an action in the United States District Court for the District of Colorado seeking an award considerably more than what he was actually awarded by the jury. The judgment was entered and Budinich timely filed for a new trial under Rule 59, Fed.R.Civ.P., and asked for attorney's fees. The trial court denied a new trial but agreed that attorney's fees were in order and requested further briefing and documentation. An order to this effect was entered on May 14, 1984 but the order concerning attorney's fees was not issued until August 1, 1984. Budinich appealed all post judgment orders on August 29, 1984 and Becton moved to

dismiss on grounds that the appeal should have been taken within thirty (30) days after the May 14, 1984 judgment was entered.

In Budinich, 486 U.S. at 198-99, the court held, "Under 28 U.S.C. s. 1291, 'all final decisions of the district courts' are appealable to the courts of appeal." The court went on to say,

> "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Catlin v. United States, 324 U.S. 229, 233 (1945). A question remaining to be decided after an order ending litigation on the merits does not prevent finality if its resolution will not alter the order or moot or revise decisions embodied in the order. [citations omitted]

486 U.S. at 199.

This Court then went on to explain that an award of attorney's fees is not part of the merits of the action but is a supplimental matter. The Court announced "a uniform rule that an unresolved issue of attorney's fees for the litigation in

question does not prevent judgment on the merits from being final." 486 U.S. at 202. The Court went on to say,

> Courts and litigants are best served by the bright-line rule. . . that a decision on the merits is a "final decision" for purposes of s. 1291 whether or not there remains for adjudication a request for attorney's fees attributable to the case.

486 U.S. at 202 - 203.

In Budinich this Court then agreed with the Tenth Circuit Court of Appeals that the appeal of a final order on the merits was not before the appellate court because the notice of appeal on that was late in being filed, but the appeal of the award of attorney's fees was timely.

Based on Budinich and the nature of the events before the Eleventh Circuit Court of Appeals, it properly declared, "Appellee Strange's Motion for Clarification did not toll the time for appealing from the district court's judgment on the merits in this action because it addressed

only the award of fees and costs to him." (APPENDIX 1). With this the Petitioner agrees.

The Eleventh Circuit then went on to say that "Strange's motion seeking reconsideration of the award of fees and costs tolled the time for appealing from those awards." It cited Wielgos v. Commonwealth Edison Co., 892 F.2d 509 (7th Cir. 1989) as additional authority. (APPENDIX 1).

In Wielgos the district court entered a final judgment on the merits and Wielgos appealed. On July 8, 1988 the district court qualified the award of costs and Wielgos filed appeal on August 4, 1988 even though the order was not entered until September 19, 1988. The Seventh Circuit held that appeal was timely under Rule 4(a)(2), Fed.R.Civ.P. However, Wielgos then moved for reconsideration of the award entered September 19. The Seventh Circuit concluded that this motion nullified the pending notices of appeal. The

motion for reconsideration was denied October 4, 1988 but Wielgos did not file a new notice of appeal. The Seventh Circuit declared it had jurisdiction of the appeal on the merits but did not have jurisdiction on the appeal of the award of fees and costs.

The Eleventh Circuit has properly seen that in both Budinich and Wielgos there was one appellant and one appellee while in the matter before the lower appellate court there is one appellant but four (4) appellees. Based on this situation as it differs from these cases, the Eleventh Circuit properly extrapolated and identified that since "Strange's Motion for Clarification . . . addressed only the award of fees and costs to him * * * [it] tolled the time for appealing from those awards." Therefore, the Eleventh Circuit reasoned that "[s]ince this appeal was filed prior to the entry on the docket of the district court's order denying

Strange's motion, it was premature and ineffective with respect to the award of fees and costs. See Acosta v. Louisiana Department of Health and Human Resources." Id. (APPENDIX 1).

The Petitioner does not refute that in light of the specific set of circumstances before it, the Eleventh Circuit Court of Appeals made a proper application of Budinich and Wielgos to Acosta by holding that since Strange's Motion for Clarification filed in the district court addressed only the award of fees and costs to Strange, it should not effect anything else on appeal.

What the Petitioner does challenge is that the appellate court failed to comprehend and apply properly the court's definition of "final judgment" as set forth in Budinich and in the specific circumstances and events leading up to the filing of the notice of appeal and the specific verbage in the notice as to what is appealed.

As already noted, in the district court Strange had filed two motions for fees and costs. In the first motion he sought $3895.50 in fees and $161.06 in costs which was awarded. This covered the time span of August 5, 1992 through October 27, 1992. In the second motion he sought $2500.00 in fees and $141.00 in costs for the time span of October 28, 1992 through March 25, 1993. This was denied. (APPENDIX 4). The notice of appeal says that the Petitioner does not appeal the denial of Strange's second motion for fees and awards. (APPENDIX 8). (Why would Duncan appeal a victory for him?)

Since Strange's second motion was asking for additional fees and costs for a time period different than his first motion, it was a supplimental request pursuant to its nature and Budinich. Strange's Motion for Clarification (APPENDIX 7) addressed only the denial of the

second motion for fees and costs, a matter that was not on appeal. Further, while the motion, if granted, would have altered the final judgment as to the total amount awarded in fees and costs, such is only a technical change. The motion would have done nothing to decrease the award already made or to have prevented execution on it. Based on Budinich, 486 U.S. at 198 - 99, the amount of $3895.50 in fees and $161.00 in costs already awarded was final and therefore appealable. Therefore, irregardless as to whether Strange's motion is a nullity or not, it did not effect the finality of the amounts already awarded to him. Thus his motion did not effect a Rule 4(a)(4), Fed.R.App.P., bar as to the tolling of time and the appellate court properly has jurisdiction to review the award as stated in the judgment and notice of appeal. A matter not appealed forms no bar.

The Eleventh Circuit also failed to

note two other controlling matters as to what determines a Rule 4(a)(4) bar. The first is that Rule 4 is controlled by Rule 3(c), Fed.R.App.P. Rule 3(c) states, "The notice of appeal . . . shall designate the judgment, order or part thereof appealed from. . . . [emphasis added]"

It stands to reason not just because Rule 3, Fed.R.App.P., precedes Rule 4, Fed.R.App.P., that it controls, but it is logical that before the notice of appeal can be filed, it must first be drawn up. Thus, since there was no sane reason for Duncan to appeal the part of the judgment in his behalf, and since Strange's motion effected something both supplimental to what was appealed and addressed a matter he did not appeal (irregardless of the fact Strange's motion itself is a nullity), it cannot be held that a Rule 4(a)(4) bar was created by a motion addressing a matter not on appeal and would not effect the finality of what was appealed.

For these reasons the Court should grant certiorari to clarify if Budinich and Acosta create a bar under Rule 4(a)(4), Fed.R.App.P., when a Rule 59(e), Fed.R. Civ.P., motion is filed addressing a matter not appealed and not effecting the finality of what is appealed.

CONCLUSION

This Court should grant certiorari and then either call for briefs on the merits or summarily dispose of this matter in favor of the Petitioner on the merits.

Respectfully submitted,

/s/
Carl J. Duncan
Pro Se

APPENDIX

APPENDIX 1

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 93-2490

CARL J. DUNCAN,

Plaintiff-Appellant

versus

RITA KAY DUNCAN,
a/k/a Rita Kay Scott,
a/k/a Rita Kay Young;
EDWARD M. JACKSON;
LAWRENCE M. LITUS;
GEOFFREY G. STRANGE;

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Florida

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Before TJOFLAT, KRAVITCH and COX, Circuit Judges.

B Y T H E C O U R T:

Appellee Strange's Motion for Clarification did not toll the time for appeal-

ing from the district court's judgment on the merits in this action because it addressed only the award of fees and costs to him. See Budinich v. Becton Dickinson and Co., 486 U.S. 196, 108 S.Ct. 1717, 100 L.Ed.2d 178 (1988). Therefore, this appeal from the judgment on the merits MAY PROCEED. However, Strange's motion seeking reconsideration of the award of fees and costs tolled the time for appealing from those awards. See, e.g., Wielgos v. Commonwealth Edison Co., 892 F.2d 509 (7th Cir. 1989). Since this appeal was filed prior to the entry on the docket of the district court's order denying Strange's motion, it was premature and ineffective with respect to the award of fees and costs. See Acosta v. Louisiana Department of Health & Human Resources, 478 U.S. 251, 106 S.Ct. 2876, 92 L.Ed.2d 192 (1986)(per curiam). Accordingly, appellant's appeal from the award of fees and costs is DISMISSED.

Entered Sept. 23, 1993

# # # # # # # # #

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CARL J. DUNCAN,

Plaintiff,

v. CASE NO. TCA 92-40291-MMP

RITA KAY DUNCAN, et al.,

Defendants.
_____/

O R D E R

On October 25, 1992, this Court dismissed with prejudice plaintiff's complaint against all defendants, finding plaintiff's complaint to be without merit and that this Court lacked jurisdiction. That Order provided defendants fifteen days to apply for attorneys' fees (Doc. 45). The Court heard oral argument March 25, 1993 on: defendant Jackson's application for award of attorneys' fees (doc. 46), defendant Strange's motion for Rule 11 sanctions including attorneys' fees and costs (doc. 49), and de-

fendant Rita Kay Duncan's motion for attorneys' fees and costs (Doc. 50). The Court also considered defendant Strange's motion for attorneys' fees and costs filed in open court as well as defendant Litus's motion for fifteen days to apply for attorneys' fees. Also pending are plaintiff's motions: (1) for a rehearing or for an amended judgment (doc. 52), for a clarification (doc. 54), and for attorneys' fees and costs.

Plaintiff's motions for rehearing and for clarification are DENIED. Motions for attorneys' fees and costs, filed by defendants Jackson and Strange are GRANTED. Motion for attorneys' fees filed by defendant Rita Kay Young (nee Duncan) is DENIED. Defendant Litus's oral motion for an additional fifteen (15) days to file a request for attorneys' fees is DENIED. Plaintiff's motion for attorneys's fees and costs is DENIED.

This Court finds plaintiff's complaint

to have been meritless since its inception, and plaintiff's actions to have been and to continue to be vexatious. The award of attorneys' fees and costs to defendants Jackson and Strange is founded on both prevailing party principles as well as Rule II. Further, this Court finds the hours expended, and rates and costs proffered in Jackson's and Strange's affidavits to be reasonably incurred. Defendant Jackson's award is to be forwarded to the State of Florida Department of Legal Affairs.

Accordingly, it is

ORDERED:

1. Plaintiff's motion for rehearing and for clarification are DENIED.

2. Defendants Jackson's and Strange's motions for attorneys' fees and costs are GRANTED. Defendant Jackson is awarded $5375.00. Defendant Strange is awarded $3895.50 in attorneys' fees and $161.06 in costs.

3. Defendant Rita Kay Young's (nee

Duncan's) motion for attorneys' fees is DENIED.

4. Defendant Litus's oral motion for an additional fifteen (15) days to file a request for attorneys' fees is DENIED.

5. Plaintiff's motion for attorneys' fees and costs is DENIED.

6. All other motions filed in this matter are rendered moot.

7. Defendant Jackson's award is to be forwarded to the State of Florida Department of Legal Affairs.

8. The Clerk is directed to enter judgment in this matter.

DONE AND ORDERED this 26th day of March, 1993.

/s/
MAURICE M. PAUL,
CHIEF JUDGE

Entered 3-29-93

# # # # # # # # #

APPENDIX 3

United States Distric Court Northern District of Florida

CARL J. DUNCAN 92-40291 MMP

v

RITA KAY DUNCAN Maurice Paul

Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Plaintiff's motions for rehearings and for clarification are DENIED Defendants Jackson's and Strange's motions for attorneys' fees and costs are GRANTED. Defendant Jackson is awarded $5,375.00. Defendant Strange is awarded $3,895.50 in attorneys' fees and $161.06 in costs. Deft. Rita Kay Young's (nee Duncan's) motion for attorneys' fees is DENIED Defendant Litus's oral motion for an additional fifteen (15) days to file a re-

quest for attorneys' fees is DENIED. Plaintiff's motion for attorney fees and costs is DENIED. All other motions filed in this matter are MOOT.

CLERK

MARVIN S. WAITS 3/29/93

(BY) DEPUTY CLERK

/s/

Entered 3/29/93

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APPENDIX 4

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CARL J. DUNCAN,

Plaintiff

v. CASE NO. TCA: 92-40291/MMP

RITA KAY DUNCAN, et al.

Defendant(s)

CORRECTED
JUDGMENT IN A CIVIL CASE

This action came on for trial before the Court the Honorable Maurice M. Paul, District Judge, presiding, and the issues having been duly heard and the Court having

duly rendered its decision.

It is ORDERED and ADJUDGED the the (sic) plaintiff CARL J. DUNCAN take nothing, that the action is dismissed on the merits, and that the defendant EDWARD M. JACKSON recover from the plaintiff CARL J. DUNCAN, $5,375.00 in Attorney's Fees. That defendant GEOFFREY G. STRANGE recover from plaintiff CARL J. DUNCAN the sum of $3,895.50 in attorney's fees and $161.00 in costs.

Defendant JACKSON's award is to be forwarded to the State of Florida Department of Legal Affairs.

DATED this 30TH day of MARCH, 1993.

/s/
For MARVIN S. WAITS
CLERK OF COURT
by Charles R. Cook
Deputy Clerk

Entered March 30, 1993

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APPENDIX 5

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CARL DUNCAN,

VS CASE NO. 92-40291 MMP

RITA DUNCAN, ET AL

Referred to Chief Judge Paul on 4/7/93

Type of Motion/Pleading MOTION FOR CLARIFICATION

Filed by DEFT. on 4/5/93 Doc. No. 82

RESPONSES:

MARVIN S. WAITS, CLERK

BY: SARAH LOGAN
Deputy Clerk

ORDER OF COURT

On the foregoing it is ORDERED this 24th day of April 1993:

The Relief Requested is denied by this order.

/s/
MAURICE M. PAUL, CHIEF JUDGE

Entered 4-28-93

APPENDIX 6

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 93-2490

CARL J. DUNCAN

Plaintiff-Appellant,

versus

RITA KAY DUNCAN,
a/k/a Rita Kay Scott,
a/k/a Rita Kay Young;
EDWARD M. JACKSON;
LAWRENCE M. LITUS;
GEOFFREY G. STRANGE,

Defendants-Appellees.

Appeal form the United States District Court for the Northern District of Florida

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Before TJOFLAT, Chief Judge, KRAVITCH and COX, Circuit Judges

B Y T H E C O U R T:

Appellant's petition for reconsidera-

of this Court's September 23, 1993, order dismissing the appeal from the award of fees and costs is DENIED. Appellant's argument that appellee Strange's Motion for

Clarification was a nullity is without merit.

Entered Nov. 29, 1993

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APPENDIX 7

IN THE UNITED STATES DISTRIC COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CARL J. DUNCAN,

Plaintiff,

vs. CASE NO. 92-402-92-MMP

RITA KAY DUNCAN, et al.,

Defendants.
_____/

MOTION FOR CLARIFICATION

COMES NOW, the co-Defendant GEOFFREY GREY STRANGE, attorney acting pro se, who moves this Court to clarify its March 29, 1993 Order in referenced cause and would show:

1. The order accurately and clearly states that:

a. The Court heard oral argument on March 25, 1993 on Defendant Strange's

Motion for Rule 11 Sanctions including attorneys fees and costs (doc. 49).

b. The Court considered Defendant Strange's Motion for Attorneys Fees and Costs filed in open court on March 25, 1993.

c. Motions for attorneys fees and costs, filed by Defendants Jackson and Strange were granted.

2. Defendant Strange's aforementioned, previously filed, Motion for Rule 11 Sanctions included fees of $3,895.50 and costs of $161.06 incurred August 5, 1992 through October 14, 1992.

3. Defendant Strange's Motion for Attorneys Fees and Costs filed in open court requested an additional $2,500.00 in fees and costs of $114.00 incurred October 15, 1992 through March 25, 1993.

4. The Order awarded Defendant Strange $3,895.50 in attorneys fees and $161.06 in costs.

5. If the Court intended to grant

both of co-Defendant Strange's requests for attorneys fees both of which were necessitated by Plaintiff's frivolous and vexatious complaint and by Plaintiff's subsequent and equally frivolous and vexatious motions for rehearing and for clarification, co-Defendant Strange suggests that his total award should be $6,395.50 in fees and $275.06 in costs.

WHEREFORE, co-Defendant Strange prays this Court to:

A. Clarify its March 29, 1993 Order by changing the amount of attorneys fees awarded Co-Defendant Strange from $3,895.00 to $6, 395.50 and costs awarded from $161. 06 to $275.06.

B. Rule on this Motion without hearing, or in the alternative, if the Court requires a hearing, allow the movant and any other interested parties to attend such hearing by telephone.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been fur-

nished by U. S. Mail to: Carl Duncan, 459 Inkwood Lane, Tallahassee, Florida 32310; Rita Kay Young, 3004 Morningside Drive, Tallahassee, Florida 32301; Rivers Buford, Attorney for Edward M. Jackson, Department of Legal Affairs, The Capitol, Suite 1501, Tallahassee, Florida 32399; and to Lawrence Litus, 592 Montreal Avenue, Melbourne, Florida 32935 this 31 day of March, 1993.

/s/
GEOFFREY GREY STRANGE, ESQUIRE
312 S. Harbour City Eoulevard
Melbourne, Florida 32901
(407)723-7985;FAX (407)723-8694
FL. Bar #349372

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APPENDIX 8

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

USDC CASE NO. 92-40291
-MP

CARL J. DUNCAN,

Plaintiff,

v.

RITA KAY DUNCAN, a/k/a
RITA KAY SCOTT, a/k/a
RITA KAY YOUNG,
EDWARD M. JACKSON,
LAWRENCE M. LITUS, and
GEOFFREY G. STRANGE,

Defendants

_____/

NOTICE OF APPEAL

NOTICE IS HEREBY given that CARL J. DUNCAN, plaintiff above named, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the Orders dated October 26, 1992 and March 26, 1993 and the Corrected Judgment in a Civil Case dated March 30, 1993 entered in this action on November 3, 1992; March 29, 1993 and March 30, 1993 respectively. The Order dated October 26, 1992 dismissing this action was arrested by a timely motion for rehearing. The Order Dated March 26, 1993 denied reinstatement of the action, amended the Order dated October 26, 1992 and awarded attorneys' fees and costs to defendants EDWARD M. JACKSON and GEOFFREY G. STRANGE, said Order corrected sua sponte March 30, 1993. The plaintiff will

also seek review of the Order dated October 8, 1992 which denied his Motion for Establishing as Admitted Requests for Admission. Plaintiff does not appeal the denial of attorneys' fees and costs to Defendant RITA KAY DUNCAN and LAWRENCE M. LITUS nor denial of the second motion for attorney fees and costs by defendant GEOFFREY G. STRANGE.

/s/
CARL J. DUNCAN
Pro Se
459 Inkwood Lane
Tallahassee, Florida 32310
(904) 674-5901, ext. 172

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APPENDIX 9

NO. 93-2490

JURISDICTIONAL QUESTION(S)

(1) Whether this appeal was premature and ineffective because it was filed prior to the entry on the docket, On April 28, 1993, of the district court's order denying defendant Strange's motion to amend the final judgment?

Fed.R.App.P. 4(a)(4); Acosta v. Louisiana Department of Health and Human Resources, 478 U.S. 251, 254, 106 S.Ct. 2876, 1877-78, 92 L.Ed.2d 192 (1986)(per curiam).

2. If so, whether appellant must file a new notice of appeal within thirty (30) days of the entry of that Order? Fed.R.App.P. 4(a)(1).

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APPENDIX 10

LEGAL AUTHORITIES

Title 28, United States Code, Section Section 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or ciminal case, before or after rendition of judgment or decree.

Federal Rule of Civil Procedure 59(e)

Motions to Alter or Amend a Judgment. A motion to alter or amend the judgment

shall be served not later than 10 days after entry of the judgment.

Federal Rule of Appellate Procedure 3(c)

The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken.

Federal Rule Appellate Procedure 4(a)(1)

In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from. . . .

Federal Rule of Appellate Procedure 4(a)(4)

If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings

of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above.

United States Supreme Court Rule 10.1(a)

When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter. . . .

United States Supreme Court Rule 10.1(c)

When a . . . United States court of appeals has decided an important question of federal law which has not been, but

should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

United States District Court for the Northern District of Florida Local Rule 6(A)

A moving party shall serve and file with every motion in a civil or criminal proceeding a memorandum with citation of authorities in support of the motion. If the motion requires a consideration of facts not appearing of record, the party shall also file and serve affidavits, photographs, and documentary or other evidence required or permitted by law or applicable Federal Rules. The clerk shall not accept any motions not accompanied by such memorandum, except that the following motions need not be accompanied by a memorandum:

(1) Motion for writ of habeas corpus ad testificandum or ad prosequendum;

(2) Motion for out-of-state process;

(3) Motion for order of publication for

process;

(4) Application for default;

(5) Motion for judgment upon default;

(6) Motion to withdraw or substitute counsel;

(7) Motion for continuance, provided the good cause supporting it is set forth in the motion;

(8) Motion for confirmation of sale;

(9) Motion to withdraw or substitute exhibits;

(10) Motion for extension of time in which to complete discovery providing the good cause supporting it is set forth in the motion;

(11) Motion for refund of bond, provided cause for granting the motion is set forth in the motion;

(12) Application for leave to proceed in forma pauperis;

(13) Motion for appearance pro hac vice; and

(14) Motion to deposit funds with the

court.

United States District Court for the Northern District of Florida Local Rule 6(C)

Each party opposing a motion shall file and serve, within ten (10) days after being served with the motion, a memorandum with citation of authorities in opposition to the motion. * * * Failure to file such memorandum may be sufficient cause for the granting of the motion by default.